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Supreme Court of the United States

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY,.....*Appellant,*

v.

Z. M. McCARROLL, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS,.....*Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF FOR APPELLANT

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We believe that the determination of the question involved in this appeal is dependent upon the construction of the terms of the compact entered into by the United States and the State of Arkansas as reflected by the Act of Congress of March 3, 1891, the General Assembly of the State of Arkansas of February 21, 1903, and the Act of Congress of April 20, 1904, to which specific reference has been made in the brief filed by appellant, in which statement appellee apparently concurs, as reflected by paragraph three, page 7, of his brief. For this reason, we are submitting this brief in reply to correct what we think is an apparent, though innocent and unintentional misstatement of the terms of the Act of Congress of April 20, 1904, in their relationship to those of the Act of Congress of March

3, 1891, as reflected by the first and second paragraphs of page 16 of his brief, wherein the statement is made that "* * * Congress did not mention any restriction on the taxing right of the State of Arkansas in this statutory enactment; it described the right of taxation of the State as including the right to tax all structures and other property in private ownership within the boundaries of the Hot Springs Reservation, without any limitation to a particular form of such taxation."

As authority for this statement a citation is made to Title 16, Section 372, United States Code Annotated. This section of that Code is a digest of the act of acceptance of the ceded area, namely, the Act of Congress of April 20, 1904, c. 1400, paragraph 1, 33 Stat. 187. It in turn in describing the taxing rights which the State of Arkansas has in the area, refers to and embraces Section 365, Title 16, of that Code. This Section 365 is a digest of the original taxing grant of the Act of Congress of March 3, 1891, which the Legislature of the State of Arkansas, in Act No. 30 of the General Assembly approved February 21, 1903, adopted and embraced. This Act of March 3, 1891, therefore, is a part of each of the other two Acts, and it provides:

> "The consent of the United States is hereby given for the taxation under authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

It is true that neither of the acts used the words "ad valorem" as an additional description of the character of the taxing right accorded the State of Arkansas, as stressed by appellee in his argument on the subject of the construc-

tion of these acts, at pages 14 and 15 of his brief. But they do by reference to the Act of March 3, 1891, use the term "equal taxation of personal property."

Article XVI, Section 5, of the Constitution of Arkansas, section (a), uses the term "equal and uniform" and not "ad valorem", and the courts of this State have uniformly held that said sections (a) and (b) of the Constitution referred to, apply to that property assessed on an ad valorem basis. "Ad valorem" is not a descriptive term of a species of tax. It simply means according to value, as distinguished from use.

Section III of the brief of appellee, is devoted to an argument that geographical boundaries of the State determine the applicability of the cases of *Royster-Guano Company* v. *Virginia,* 253 U. S. 412, and *McGarroll, Commissioner,* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. (2d) 254, in their consideration of Amendment XIV to the Constitution of the United States. Apparently the contention is made that the decision of this Court in the case of *Collins* v. *Yosemite Park & Currie Co.,* 304 U. S. 517, has the effect of limiting the Royster case, *supra.*

If the Court will again refer to our original brief, pages 43 to 47, inclusive, it will be noted that it was our contention that the State is precluded from collecting an income tax on business conducted in a place outside of its sovereignty. We did not there contend, nor do we now contend, that the Hot Springs National Park is beyond the geographical limits of the State of Arkansas, or that appellant was organized under Act No. 220 of the Acts of Arkansas for 1931. In this connection, we do not think therefore that this Court is concerned primarily with the question of the construction of the meaning of the words "doing business entirely outside the State of Arkansas", which refers

to the corporations organized under the laws of this State and which by the Act are exempt from the payment of all taxes except that upon tangible property within the State. That question would be involved only in the event appellant contended that it was entitled to the benefit of the Act itself. Act No. 220 of Arkansas for 1931, has extended to certain corporations a privilege or an immunity which has not been extended to all other corporations organized under the laws of Arkansas, whether to do business within the park area, military reservations, partly in the State and partly out the State, and otherwise. The Act itself therefore raises the question of the application of Amendment XIV to the Constitution of the United States. In other words, is appellant by the constitutional provision entitled to the same privilege or immunity, and is an Arkansas corporation not organized under Act No. 220 which conducts business within and without the State, likewise entitled to this privilege or immunity? The constitutional provision requires that it be extended if a similar circumstance exists, and the Supreme Court of Arkansas in the McCarroll case, *supra,* says that a similar circumstance does exist with reference to that portion of the income derived from the Texas operations of Gregory-Robinson-Speas, Inc., not because the words "outside the State" were used in Act No. 220, but because of the classification resulting therefrom, and, in the final analysis, because the operations beyond the sovereignty of the State in each instance were without the benefit of and not subject to regulation by the State of Arkansas. The test, we therefore contend, is sovereignty.

As we have pointed out in our original brief, appellant's operations are conducted solely under the rules and regulations pertaining to national parks and under a system of laws of another sovereign, that is, the United States.

Arkansas contributes nothing to its operations; it does take something from those operations, that is, the tax permitted by the Act of Congress of March 3, 1891, but nothing else, which ought under the Royster case to operate in its favor and not against it.

We do not believe that the decision in the case of *Collins* v. *Yosemite Park & Currie Co., supra,* has modified, nor did it intend to modify, the Royster case, as contended by appellee, or that the Supreme Court of Arkansas intended to limit its decision in the McCarroll case strictly to a situation where a domestic corporation derives income from within the State of Arkansas and from other States. In the Collins case Amendment XIV to the Constitution of the United States was not involved, and in the McCarroll case sovereignty in other areas not beyond the geographical boundaries could not be involved. It was unnecessary for the Supreme Court of Arkansas, in reaching a decision in that case, to make any distinction between the terms "outside the State" and beyond the sovereignty.

The Court was powerless to limit the application of the constitutional guarantee of equality and uniformity, and there is no indication that such an attempt was even contemplated in that decision, but quite to the contrary the opinion stressed the need for absolute equality and uniformity; thereby nullifying the act of the Legislature which had infringed the constitutional provision.

It is arguing in a circle to say that because the act levying the tax states that it shall apply to all persons within the geographical borders of the State, it necessarily follows as a matter of law that it could not infringe this constitutional provision, for the advocate of this finds himself right back to a construction of the terms of the Act of Con-

gress of March 3, 1891, to determine the sovereign authority to levy the tax in the first instance.

A legislative enactment infringes the Constitution from the date of its enactment if at all, and whether or not it infringes is determined by reference to the act itself, and not by what some person may have done or may do under it. It is the holding out of opportunity to create a situation of unequality, and not the taking advantage of the opportunity, that renders the act unconstitutional. For instance, let us test appellee's theory by the Gregory-Robinson-Speas case itself. The Court held that its Texas operations for the year in question were not subject to income tax, because Act No. 220 of 1931 had made it possible for a corporation to organize here, do all its business in Texas, and be expressly exempt from income taxation. If for some reason that company should fail to do one dollar's worth of business in Arkansas during the following year, either through choice or destruction by fire of its Arkansas plant, and at the same time file no amendment to its articles of incorporation, it would be apparent that a tax levied on the Texas operations for the latter year would not change from unconstitutionality to constitutionality. If this were not so, what would be the test of the amount of business the company would have to do in Arkansas to maintain its status on Texas operations?

In the Collins case, in addition to the per unit sales tax, an additional license feature was embraced in the act, and each provision purported to extend to the geographical limits of the State of California. The license tax was upheld by this Court because California had reserved "the right to tax persons and corporations, their franchises and property." The license feature was not upheld, and it was enacted to apply "in this State" just the same as the unit

sales tax. So, again, the answer is found in the extent of the sovereignty reserved by the State in its act of cession.

The property tax involved in the case of *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, by the terms of the act levying the tax, extended to the geographical limits of Arkansas; nevertheless, it was inoperative on the United States military reservation, because sovereignty did not exist in the State to levy it within the area, which likewise is in the geographical borders of Arkansas. All of this of course shows that the act levying the tax in the first instance cannot override the Constitution or exceed the State's sovereignty merely by a statement contained in it that it applies to a given geographical area.

In Section IV of appellee's brief, apparently the position is taken that the State has general taxing power over individuals in the area and that any restruction applies only to such taxes as are regulatory in their nature. That would be so if Arkansas on cession of the area had reserved the right to tax persons and corporations, their franchises and property, as was done by California when it ceded the park areas in that State, but the theory is not correct unless the provisions of the Act of March 3, 1891, mean general taxation. The construction of that Act however is the primary question in this case, and if there were no question about the meaning of the terms of that act, there would be no reason for either party to be before the courts. The cases of *Williams* v. *Arlington Hotel Co.*, 22 F. (2d) 669, and *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439, are offered as authority by appellee in support of his position. We quote from the first paragraph of appellee's argument on that subject:

> "In both of these cases the State acts in question were regulatory acts by which the State was attempt-

ing to exercise its police powers. Such regulations affected the Government's rights to use its own lands, and, of course, could have seriously hampered the Government in the exercise of its power to lease lands in the reservation."

Appellee apparently is not serious in that contention, for the act in question bore no resemblance to police power, but rather it was a general law of civil liability between individuals, in which the United States had no interest whatever, and which could not have affected the Government's rights in the lands in the remotest degree.

We urge that it is manifestly unfair to subject appellant and others similarly situated to an accumulation of taxes for a long period of time, in view of the acquiescence of appellee and his predecessors in office in the construction of the acts in question advocated by appellant, since during this period of acquiescence the rates, dividends, reserves and operation of appellant's business have been under the supervision of the National Parks Service of the Department of the Interior without any account having been taken of contingent liability for the tax accumulation by the Department in fixing those rates, dividends, or reserves. The action of the appellee as Commissioner might have the effect of indirectly attempting to influence the rates for baths, which rates are in the exclusive jurisdiction of the National Parks Service, thereby bringing about the very situation that the parties to the compact attempted to avoid by the enactment of the statues in question on the subject.

Respectfully submitted,

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